of the 2nd part and Lim Eow Hooi, Lim Keng Chuan and Lim Seong Wah of the 3rd part subsists no order being made in respect of prayers 2, 3, 4, 5 and 6 of the counterclaim AND THE COURT DOTH FURTHER ORDER AND DECLARE as to the counterclaim of the 4th, 7th and 8th defendants that all those fourteen pieces of land and hereditaments situate in the North East District of Penang and more particularly described in the Schedule to the aforesaid indenture dated the 17th day of September 1930 (Registered No. 80 Volume 691) are held by the trustees in trust upon the terms and conditions as set out in the aforesaid indenture dated the 17th day of September 1930 (Registered No. 80 Volume 691) AND THE COURT DOTH FURTHER ORDER that the sum of $147,349.59 deposited in court together with all interest earned therefrom be paid to the 1st, 2nd and 3rd defendants as trustees of the said indenture dated the 17th day of September 1930 (Registered No. 80 Volume 691) AND IT IS FURTHER ORDERED that the costs and inciden als of the 1st, 2nd and 3rd defendants of this action and their counterclaim and the costs and inciden'als of the 4th, 7th and 8th defendants of this action and of their counterclaim be taxed as between party and party on the higher scale of the Second Schedule to the Rules of the Supreme Court, 1957 and when taxed to be paid by the plaintiff to the said defendants AND IT IS FURTHER ORDERED that the costs and incidentals of the Solicitors for the 1st, 2nd and 3rd defendants be taxed as between solicitor and client on the higher scale of the Second Schedule to the Rules of the Supreme Court, 1957 and when taxed the difference between party and party costs and solicitor and client costs be paid out of the funds in the hands of the trustees AND IT IS LASTLY ORDERED that execution be stayed pending appeal and if appeal is filed then until the decision of the Court of Appeal."

The matter went on appeal to the Federal Court and a consent order in terms following was made on the 19th April, 1967:—

"1. that the costs of all parties herein and in the court below be taxed as between solicitor and client and when so taxed be paid out of funds in court.

2. that from the balance of the funds in court after paying such costs 20% thereof be paid to the trustees to be invested by them.

3. that the other 80% of such remaining balance be paid out to the appellant.

4. that this compromise is to be settlement of all outstanding claims and disputes between the parties as regards past accounts and past accounting."

It is now claimed by the plaintiff that the judgment of Hepworth J. was in effect varied by the Federal Court. The defendant however asserts that the validity of the trust has been finally adjudicated upon and the matter is *res judicata* and the plaintiff is estopped from raising the matter. The defendant contends that the consent order made by the Federal Court only had reference to the matter of costs and to the acquisition monies paid into court and did not extend to that part of the judgment that the trusts created by the indenture was still valid and subsisting. The defendant avers that even if no more burials were to be permitted, the other trusts concerning the maintenance and upkeep of all graveyards, tablets and tombs on the said hereditaments are still valid and subsisting and capable of performance. This is borne out by clause 25 of the said indenture which reads:—

"And the trustees hereby jointly and severally covenant with the confirmor his executors or administrators that they will during their lives and the life of the last survivor of them maintain and keep the said hereditaments as a burial ground for the use and benefit of the family and descendants of the said Lim Leng Cheak deceased and will not sell mortgage or otherwise dispose of the same and that they will out of the profits and income to be derived therefrom maintain and keep in good order and repair all graveyards tablets and tombs now erected or hereafter to be erected on any part thereon."

I agree and accordingly hold that the trusts created by the said indenture subsists and there is no resulting trust in favour of the plaintiff. There will be an order for costs to be paid and borne by the plaintiff personally.

Order accordingly.

Solicitors: *Ong Huck Lim & Co.; C. O. Lim & Co.*

JOHN ANAK LIMAN & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Pike C.J. (Borneo), Ismail Khan & Silke Ag. F.JJ) July 23, 1968]

[Kuching — Federal Court Criminal Appeal No. X. 5 of 1968]

Criminal Law and Procedure — Death sentence — Age of accused — Doubt as to whether at time of offence accused were of or above 18 years of age — Criminal Procedure Code (Sarawak Cap. 58), s. 219.

Penal Code, s. 300 — Murder — Accused's age — Responsibility of court.

The appellants were convicted of murder and sentenced to death. They appealed against their sentence on the ground that the court ought to have been satisfied that at the time of the offence they were of or above 18 years of age. The second appellant also appealed against his conviction on the grounds that the learned trial judge misdirected himself and the assessors on the question of common intention and abetment.

Held: (1) section 219 of the Criminal Procedure Code places a responsibility on the court to be satisfied that the appellants were not under 18 years of age. There was some doubt as to whether the appellants had attained the age of 18 years on or before the date on which the offence was committed and the court had to resolve that doubt in favour of the accused. The sentence of death should therefore be set aside;

(2) upon consideration of the summing up of the trial judge as a whole it was not so deficient on the question of common intention as to justify interference by the court;

(3) there was no merit in the ground of appeal that dealt with abetment and with aiding and abetting.

FEDERAL COURT.

George Seah for the 1st appellant.

C. T. Wong for the 2nd appellant.

C. J. Millar (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Pike C.J. (Borneo) (delivering judgment of the Federal Court): The accused John anak Liman and Jubang anak Lapik were convicted of murder and sentenced to death. John anak Liman appeals against his sentence on the ground that the court ought not to have been satisfied that at the time of the offence he was of or above the age of 18 years. His three grounds of appeal relate only to this matter. Jubang anak Lapik appeals both against his conviction and against his sentence, and his appeal against sentence is also on the ground that the court ought not, on the evidence before it, to have been satisfied that he was of or above the age of 18 years. It will be convenient, therefore, to deal with this ground of appeal against sentence first since it is common to both the appellants' appeals. The only reliable evidence before the court as to the age of each of these appellants was the statement of each appellant that he was 18 years of age. They were giving evidence some five months after the date of the alleged offence and counsel for each appellant has urged that the age which they gave was the age at the time of giving evidence and not their age at the time of the commission of the offence. We think that this point is a valid one. Section 219 of the Criminal Procedure Code (Sarawak Cap. 58) provides that "Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years". Some attempt was made by counsel to suggest that this casts a burden on the prosecution to prove that an accused is over the age of 18. We do not accept this view since the age of a person is peculiarly within his knowledge. The section places a responsibility on the court to be satisfied that the accused is not under 18 years of age. If there was any evidence that the accused at the time of the offence was over 18 the bare statement that he was 18 years of age at the time of trial might well not be sufficient to contradict such earlier evidence. But in this case the only evidence is as to their age at the time of trial. We therefore feel that there is some doubt as to whether they had attained the age of 18 on or before the date on which the offence was committed and accordingly we must resolve that doubt in favour of each accused. The sentences of death must therefore be set aside and a sentence that each accused be detained during the pleasure of the Governor be substituted thereof.

We feel that it is necessary to emphasise that there is a duty on counsel for the defence to raise matters such as this before sentence is passed and had we been satisfied beyond doubt that the court had given an opportunity to the defence to address by way of allocutus and had the question not then been raised we would have been unwilling to disturb the sentences.

We turn now to the appeal of Jubang anak Lapik against his conviction. Mr. Wong has urged that the learned trial judge either misdirected or fail to direct the assessors on matters of law which were vital to his client's case. I set out below the grounds of appeal of Jubang anak Lapik:—

(1) That the learned trial judge misdirected himself and the assessors on the question of common intention when he stated that at the time of the killing Jubang (the appellant) shared with John a common intention to rob and kill.

(2) That the learned trial judge erred in law in not giving any or adequate direction to the assessors on what is abetment.

(3) That there was no clear direction given by the learned trial judge to the assessors as what on the proved facts of Jubang's conducts constituted aiding and abetting.

(4) That there was misdirection by the learned trial judge to the assessors on the question of onus of proof in respect of Jubang's case.

(5) That the conviction should not and ought not to have been upheld having regard to the evidence adduced before the court, in particular when the learned trial judge and the assessors seemed to believe Kasau anak Unguop's evidence.

(6) That there was no evidence at the trial to show that the appellant was 18 or above on the day of the alleged commission of the alleged offence.

The facts briefly are that the two accused together with three other younger persons aged between 8 and 14 went out on a fishing expedition. It was alleged that this expedition was arranged by John and that it was at his invitation that all five of them went fishing. After they had been fishing for some time John suggested that they should go over to Nanga Kain where the deceased Chinese had a small village shop. On the way while all five were still in the boat John is alleged to have said "Come let us go and kill the Chinese" and Jubang is alleged to have replied "yes" or "come then", that is to say, Jubang consented to the proposition and they then made for the landing stage to the deceased's shop. The two smallest boys Sirai and Imbat were scared at this proposition and as soon as the boat touched the ground they jumped out and went off. The two accused and the older boy of 14 went up to the shop and made attempts to break in. While they were attempting to break in the deceased awoke and sounded a gong. The three accused ran off and got into the boat and paddled away. Jubang and Kasau reached the boat first and John got in later. After paddling some distance John persuaded them to go back. It is alleged that he threatened

them and that is why they returned with him. They then left the boat and went back to the shop; John leading and the other two following behind. There they called out to the deceased inquiring what was the matter and pretending that they were coming to help him look for thieves. They were invited into the shop and given cakes and cigarettes by the deceased and some talk took place about padi farming. After they had finished their cakes and cigarettes the evidence of both Kasau, who was called as a prosecution witness, and Jubang, the second accused, was that they suggested to John that they should leave but John refused, according to Jubang, saying "not yet, by and by we return". The deceased took up a flashlight which he had in the shop and started shining it through the window looking for possible thieves still lurking about. While he was bending over doing this, John hit him with a daching weight across the back. The deceased fell and John hit him two or three more times: one blow striking him in the head and fracturing his skull severely. After John had struck the last blow Kasau and Jubang who had been sitting at the top of the step into the hut, Kasau just outside the door, Jubang just inside the door, jumped down on to the ground. John called to them to come back which they did because they said they were so frightened that John would do injury to them if they did not. They then proceeded to ransack the shop and steal various articles and money. These they took away in a gunny bag, got into their boat and paddled off. They picked up the other two little boys further down the stream and paddled away. They next stopped at an old pepper hut which was unoccupied and shared out the stolen goods amongst the five of them returning to their longhouse at about 5 o'clock in the morning. After three days at the longhouse John left the longhouse and only then did any of the other participants say anything about what had happened. They each said this was because they were scared of John and believed that he would injure them if they told about it. He had previously at the hut warned them that if any of them spoke about it they would be killed.

Mr. Wong has urged strenuously that the fact that Jubang, after they had eaten the cakes and smoked the cigarettes, suggested to John that they should leave then, amounts to Jubang's disassociation from the joint intention to kill the Chinese which had been formulated in the boat. But although Jubang made this suggestion he did nothing more towards persuading John to leave and he remained there throughout the attack on the deceased. The evidence was that after they had alarmed the deceased and paddled away in a boat and returned that it was John who led the way back to the shop and that Jubang with Kasau followed behind. Had Jubang then abandoned his intention to go with John on this enterprise he could then have run away. Further, at the time when he suggested that they should leave after the smoking of the cigarettes the evidence was that John was some 6 feet inside the shop while Kasau and Jubang were at the doorway. There would seem, therefore, to have been nothing to prevent Jubang from running away then and leaving John alone at the shop. Had he done so the support which his very presence with John gave would have been withdrawn and the deceased would have had only one person to deal with. It would also have put the deceased on his guard that something bad was afoot. We do not, therefore, consider that the mere suggestion on the part of Jubang was sufficient to amount to disassociation with the common intent which had earlier been formed. While the learned judge could perhaps have given more specific directions on this particular aspect of the case we feel, upon consideration of his summing up as a whole to the assessors, it was not so deficient as to justify any interference by this court with the finding and that the assessors even if more specifically directed as to this must have come to the same opinion.

We do not consider that there was any merit in the grounds of appeal which dealt with abetment and with aiding and abetting. For these reasons we consider that the appeal against conviction by Jubang should be dismissed.

Appeals against sentence allowed.

Appeal of 2nd appellant against conviction dismissed.

STEPHEN KALONG NINGKAN v. GOVERNMENT OF MALAYSIA

[P.C. (Lord MacDermott, Lord Hodson, Lord Upjohn, Lord Donovan and Lord Pearson) July 25, 1968]

[Privy Council Appeal No. 4 of 1968]

Constitutional Law — Proclamation of emergency — Emergency "where security of the Federation or any part thereof is threatened" — Plea that proclamation was in fraudem legis — Emergency as ground for amendment of Federal Constitution and Constitution of State of Sarawak — Validity of purported amendment — Constitution of Sarawak art. 41(1) — Constitution of Malaysia, arts. 4 and 150.

This was an appeal from the decision of the Federal Court, reported in [1968] 1 M.L.J. 119.

On July 22, 1963 the appellant was appointed Chief Minister of Sarawak and so acted as leader of the majority party in the Council Negri. On June 16, 1966 the Governor, acting on representations said to have been made to him by the majority in the Council that they had lost confidence in their Chief Minister, requested the appellant to resign. Upon his non-compliance the Governor, on June 17, 1966, purported to